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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 542

THE CITY OF YONKERS,

Petitioner,

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

No. 543

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers,

Petitioners,

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

No. 544

JOSEPH F. LOEHR, Mayor, JAMES J. HUSHION, Comptroller and DENNIS M. MORRISSEY, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers,

Petitioners;

against

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation.

No. 545

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"

Petitioner,

against

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, New York.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

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Opinions Below.

The opinion of the United States District Court for the Southern District of New York is reported in 23 Fed. Supp. 1018 (R. 187-196). The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 106 F. 2d 69 (R. 224-234).

Jurisdiction.

The judgments of the Circuit Court of Appeals were entered on August 22, 1939 (R. 235; P. R. 182; F. R. 177; S. R. 138). The petitions for certiorari were filed on November 20, 1939, and certiorari granted on December 18, 1939 (84 L. ed. 250). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938).

Questions Presented.

The questions presented by these writs are two:

1. Whether the effect of an *ultra vires* pledge made by a national bank in New York to secure a deposit of public funds is determined (a) by the rule in the federal courts that the bank need not repay the deposit in order to obtain the return of the pledged securities or (b) by the rule in the New York courts that the bank must repay the deposit in order to obtain this return.

2. Whether payments made by a bank to a depositor in accordance with the Presidential Proclamation after the banking holiday of March 6, 1933, but before the bank was taken over by the Comptroller of the Currency, can be recovered as preferential without any proof that the pay-

ments were made after the commission of an act of insolvency or in contemplation of an act of insolvency, or proof that the payments were made with the intent of creating a preference.

Statutes and Proclamations Involved.

The statutes and proclamations involved are set out in Appendix, *infra*, pages 34 to 39.

Companion Actions.

These are four companion actions instituted in the District Court by the Receiver against (1) the City of Yonkers, (2) the Trustees of the Police Pension Fund of the City of Yonkers, (3) the Trustees of the Firemen's Pension Fund of the City of Yonkers, and (4) The City of Yonkers, as Trustee of the "Saunders Trade School Fund". All four of the actions were tried separately, but in immediate succession. Appeals to the United States Circuit Court of Appeals for the Second Circuit were taken in all four actions simultaneously, and the appeals argued at the same time, the Court handing down one opinion bearing the caption of all four actions (R. 224). Petitions to this Court for a writ of certiorari were made and granted simultaneously in each of the four actions.

References to the Record in the City case (542) are designated by a simple "R", to the Police case (543) by "P. R.", to the Firemen's case (544) by "F. R." and to the School case (545) by "S. R."

Statement.

On July 10, 1929, the Board of Estimate and Apportionment of The City of Yonkers adopted a resolution designating certain banks as depositaries for all moneys of the City, and directing the City Treasurer to procure adequate

security for all moneys deposited by him in such banks, securing the City of Yonkers against any loss of the moneys deposited and prescribing rates of interest on the general accounts which must be received (R. 154). On September 30, 1929, The First National Bank and Trust Company of Yonkers was formed by merger of three of the depositaries named in the Resolution (R. 40, 161, 164).

On June 25, 1930, the so-called National Bank Enabling Amendment (12 U. S. C. 90, 46 Stat. 809) took effect. It provided:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State, in which such association is located in the case of other banking institutions in the State."

The banking practice and the accepted view of the law as to such pledges at the time of the passage of the Enabling Amendment and thereafter appear in the following quotation from the opinion of this Court written by Mr. Justice Black in *McNair* v. *Knott*, 302 U. S. 369, 371 (1937):

> "For many years Comptrollers of the Currency assumed that National banks had power to give security for public deposits and approved the practice of the banks in pledging such security. It has been, and is now, the policy of most states to require security for public funds whether deposited in State or National banks. The weight of judicial authority in the state courts has supported the doctrine that banks could pledge security for public deposits, but not for private deposits."

On February 28, 1933, the Court of Appeals of the State of New York handed down an opinion in *State Bank of*

Commerce v. *Stone*, 261 N. Y. 175, which held that a pledge by a state bank to secure a deposit was *ultra vires* but that the assets pledged could not be recovered without repaying the deposit.

On March 4, 1933, the petitioners had on deposit in the Bank funds as follows:

The petitioner in the City case had $275,105.53 in an account entitled, "Treasurer, City of Yonkers" (R. 94, 164, 165), and in the sum of $1,502.84 in an account entitled "City of Yonkers" (R. 141, 164, 165), and in the sum of $621.88 in an account entitled, "Nepperhan Sewer Fund, City of Yonkers" (R. 142, 164, 165).

The petitioners in the Police case had $29,233.67 in an account entitled, "Police Pension Fund, City of Yonkers" (P. R. 119), and in the sum of $50 in an account entitled, "City of Yonkers, Police Pension Fund" (P. R. 119).

The petitioners in the Firemen's case had $16,590.75 in an account entitled, "Firemen's Pension Fund, City of Yonkers" (F. R. 117).

The petitioner in the School case had $4,971.38 in an account entitled, "Saunders Trade School Trustees Fund" (S. R. 77).

On that day, The City of Yonkers held bonds having a par value of $535,000 which had been pledged with it in accordance with the Resolution, as security for the deposits in the above accounts (R. 70, 152, 153, 164, P. R. 118, F. R. 116, S. R. 79).

The Governor of the State of New York proclaimed Saturday, March 4th, and Monday, March 6th, banking holidays (R. 85), and on March 6th, the President and the Governor declared a banking holiday to and including Thursday, March 9th (R. 87). During this period and up to March 20, 1933, The First National Bank and Trust Company was under the management and control of its own

officers, but under restrictions imposed upon it and all other banks (R. 31). While the Bank was under the control of its officers and before the appointment of a Conservator, checks of the following description were honored and paid out of the following described accounts by the Bank:

Payroll checks issued by the petitioner in the City case aggregating $89,226.06 were honored and paid out of the account denominated "Treasurer, City of Yonkers" (R. 166, 167, 181).

Pension checks issued by petitioners in the Police case aggregating $566.67 were honored and paid out of the account denominated "Police Pension Fund, City of Yonkers" (P. R. 121, 135).

Pension checks issued by petitioners in the Firemen's case aggregating $150 were honored and paid out of the account denominated "Firemen's Pension Fund, City of Yonkers" (F. R. 118).

On March 20, 1933, the Comptroller of the Currency appointed a Conservator of the Bank. Between March 20, 1933, and March 28, 1933, checks of the following description were honored and paid out of the following described accounts by the Bank:

Payroll checks issued by petitioner in the City case aggregating $67,735.99 were honored and paid out of the account denominated "Treasurer, City of Yonkers" (R. 167, 181).

Pension checks issued by petitioners in the Police case aggregating $520.83 were honored and paid out of the account denominated, "Police Pension Fund, City of Yonkers" (P. R. 121, 135).

On March 28, 1933, the Conservator and the City agreed that the bank would repay the deposits to the City if the City would surrender the pledged assets. This agreement was carried out by the surrender of securities of the par

value of $534,000 (R. 72, 155) and withdrawals of the following deposits:

Withdrawals from the three accounts involved in the City case aggregating $120,141.71, making a total of $277,103.76 of deposits withdrawn from those accounts (R. 168, 169, 170, 181, 182).

Withdrawals from the accounts in the Police case aggregating $28,196.17, making a total of $29,283.67 of deposits withdrawn from those accounts (P. R. 122-124, inc.).

Withdrawals from the account in the Firemen's case aggregating $16,440.75, making a total of $16,590.75 of deposits withdrawn from that account (F. R. 118, 119, 131).

Withdrawal from the account in the School case of $4,971.38 (S. R. 86).

On February 5, 1934, after all of these withdrawals and surrenders, the United States Supreme Court in *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, held that a pledge by a national bank to secure a deposit was *ultra vires* and that the receiver of the bank could recover the pledged assets without paying back the deposits.

Thereafter these actions were brought by a Receiver who had succeeded the Conservator of the First National Bank and Trust Company of Yonkers (R. 83, 84, P. R. 87, F. R. 87, S. R. 56, 57) to recover the deposits which the Bank had paid out on payroll and pension checks and the deposits which the Conservator had paid out in exchange for the pledged assets in so far as such deposits exceeded the 50% dividend to which the City would have been entitled as an unsecured depositor.

The cases were tried before a Judge in the United States District Court for the Southern District of New York, a jury having been waived by stipulation on the record (R. 27, 28, P. R. 29, F. R. 23, S. R. 19).

If the law as laid down by the New York State courts governed the consequences of the pledge either by its own force or by adoption by the federal statute, the repayment of the deposits and the return of the pledged securities was in strict accordance with the rights of the parties so that the plaintiff could not succeed.

If, however, the law as stated in the federal courts were applicable to the consequences of the pledge, the Conservator had overpaid the City when he paid out the deposits in full and recovered the pledged securities.

Even if the repayment of the deposits had not been justified by the existence of the pledge, the Receiver could not recover without proof that the payments by the Bank were made after the commission of an act of insolvency, or in contemplation of an act of insolvency, and proof that the payments were made with the intent to prefer the City over other creditors.

The District Court (R. 184, P. R. 137, F. R. 133, S. R. 98) refused to find as Conclusions of Law that if the pledge was *ultra vires* the rights and obligations of the parties were determined by the laws of the State of New York (No. 33, R. 177, P. R. 131, F. R. 127, No. 31, S. R. 92) and that in order to recover the pledged assets it was necessary to repay the deposits in full (No. 34, R. 177, P. R. 131, F. R. 127, No. 32, S. R. 93), and that under the law of the State of New York state banks were "authorized" to give security in the case of public deposits (No. 28, R. 176, P. R. 130, F. R. 126, No. 26, S. R. 92).

The District Court found as a Conclusion of Law (No. 4, R. 173, P. R. 127, F. R. 123, No. 5, S. R. 89) that the Proclamation of March 3, 1933, did not create a presumption that the Bank was insolvent, but the court nevertheless found as a fact (No. 2, R. 159, No. 20, P. R. 107, No. 20, F. R. 106, No. 18, S. R. 80) that it was insolvent on that day.

Judgment was entered in the four cases as follows, representing 50% of the moneys withdrawn after March 4, 1933, plus interest thereon from May, 1936:

In the City case, judgment for $138,551.88, plus interest of $21,344.71, or a total of $159,970.74, including costs (R. 197, 198).

In the Police case, judgment for $14,641.84, plus interest of $2,255.73, or a total of $16,970.42, including costs (P. R. 143).

In the Firemen's case, judgment for $8,295.38, plus interest of $1,277.98, or a total of $9,651.21, including costs (F. R. 139).

In the School case, judgment for $2,485.69, plus interest of $382.93, or a total of $2,919.55, including costs (S. R. 104).

The petitioners excepted (R. 185, P. R. 138, F. R. 134, S. R. 99) and assigned error on appeal to the United States Circuit Court of Appeals for the Second Circuit (R. 210, 209, 203, P. R. 158, 159, 150, F. R. 154, 153, 146, S. R. 117, 116, 110). The latter affirmed the judgment of the District Court (R. 235; P. R. 182; F. R. 177; S. R. 138).

The City argued in the Circuit Court of Appeals that the New York State common law controlled the consequences of the pledge under *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), because the National Bank Act (unless it incorporated the state law by reference) made no provision as to the effect of an *ultra vires* pledge of assets to secure a deposit, and, as held in *National Bank* v. *Commonwealth*, 9 Wall. 353 (1869), there was no federal common law of national banking.

The Circuit Court of Appeals denied the validity of one of the necessary steps in that argument by holding that the National Bank Act did in effect make provision as to the consequences of an *ultra vires* pledge of assets to secure a deposit. It held (R. 231) that the matter was one of national concern and that the New York rule was directly in the face of the National Bank Act. It also held that the Enabling Amendment of the National Bank Act did not incorporate the New York state law by reference because

a pledge, which only existed because of the power of a New York state bank to accept the liabilities and rights thrust upon it as a consequence of the attempted exercise of a disapproved power, could not be said to be "authorized" (R. 229).

On the second point in the case, the City's claim that, because of the absence of proof of the commission of any act of insolvency or contemplation of an act of insolvency or intent to prefer the City over other creditors, the receiver could in no event recover the payments made before the Comptroller of the Currency took over the bank, the Circuit Court of Appeals held that the facts that the bank never opened for business between the day of the Presidential Proclamation and its final receivership on January 23, 1934, and that no attempt was made by the City to show any change in its condition after that date were sufficient to indicate insolvency at the time of the Proclamation (R. 233).

Specification of Errors to Be Urged.

The Court below erred in holding:

1. That the question of the consequences of the *ultra vires* pledge was governed by the decisions of the federal courts rather than the New York courts.

2. That the consequences of the *ultra vires* pledge were fixed by the policy of the National Bank Act.

3. That the so-called Enabling Amendment of the National Bank Act did not adopt the decisions of the New York courts as fixing the consequences of the *ultra vires* pledge.

4. That the mere closing of the bank in the universal banking holiday under the Presidential proclamations, coupled with the taking over of the bank by the Comptroller prior to the close of the banking holiday, is evidence that the bank committed an act of insolvency, or contemplated

an act of insolvency or intended to prefer the City over other creditors, prior to the date that the Comptroller took over the bank, within the meaning of §91 (12 U. S. C.).

5. That the judgments of the District Court should be affirmed.

A word should be said with respect to the holding by the Circuit Court of Appeals (R. 254) that the payments made by the Conservator (as distinguished from those made by the Bank) could be recovered because made by a public official under a mistake of law. This ground for recovery does not exist unless there is a mistake of law, and if, as the City contended, the New York law applied, the payments instead of being made under a mistake of law were made in strict accordance with law.

SUMMARY OF ARGUMENT.

POINT I.

Even though the Bank was insolvent, the City was entitled to hold the security until payment of its deposits in full. Since that is just what the City did, the deposits cannot be recovered from it.

(a) The Common Law of the State of New York by its own Inherent Force Controls the Consequences of the Pledge.

In New York, a pledge by a state bank to secure a deposit is *ultra vires* but the security cannot be recovered by the bank without repaying the deposit. (*State Bank of Commerce* v. *Stone*, 261 N. Y. 175, *supra*). Under the federal decisions, such a pledge by a national bank is likewise *ultra vires* but the security pledged can be recovered by the bank without repaying the deposit. (*Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, *supra*.)

The position of the City is that the New York law fixes the consequences of such a pledge made by a national bank

in New York because there is no federal statute law on the subject and there is no federal common law. (*Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, *supra*).

The Circuit Court of Appeals held that there was a federal statute on the subject in the sense that *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, *supra*, which enunciated the federal rule, in effect construed the National Bank Act as embodying that rule.

That was not the effect of the decision in the *Pottorff* case. The point in question was the third numbered point in the opinion. In that third point, no reference was made to the policy of the National Bank Act, but, on the contrary, the result was reached upon the authority of cases dealing with general corporation law. This Court cited *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, *supra*, the case which founded the New York doctrine, as *contra* instead of distinguishing the *Pottorff* case as one construing a different statute.

In the absence of a federal statute on the effect of an *ultra vires* pledge by a national bank, that effect would be ascertained by applying the familiar rule that the question whether an act is *ultra vires* is governed by the law of incorporation and the question of the effect of the *ultra vires* act is governed by the law of the state where the act is done. (Restatement of the Law of Conflict of Laws, Section 166, subdivision c. of the Comment).

The effect of the silence of the National Bank Act on the subject would be, therefore, that national banks and state banks would compete on an equal footing in so far as the effect of *ultra vires* acts was concerned. Thus, the prescribing of a special statutory rule for the national banks would be a departure from the traditional congressional policy toward placing the national banks on equality with the state banks. (*Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 564 (1934)).

The state law always governs the transactions of national banks except where in conflict with some paramount

federal law. (*National Bank* v. *Commonwealth*, 9 Wall. 353, 362, *supra*; *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, *supra*). Thus, if the National Bank Act is to override the law of the State of New York as to the consequences of an *ultra vires* pledge, it must not only indicate a general policy of Congress that an *ultra vires* act of a national bank shall be without force or effect but also indicate that Congress has actually supplanted the state law on the subject. Nothing in the National Bank Act indicates either of those things. Therefore, the consequences of an *ultra vires* act of a national bank are determined by the law of the state where it occurs. (*Security National Bank* v. *St. Croix Power Co.*, 117 Wis. 211, 94 N. W. 74 (1903)).

Incidentally, the result sought by the petitioners did not involve the recognition of a state law lien *arising on insolvency*, which is properly held to create an invalid preference. (*Old Company's Lehigh Inc.* v. *Meeker*, 294 U. S. 227 (1935)). The lien on the security arose when the security was taken, long before insolvency, and such a lien, although created by state law, is effective as applied to national banks. (*Scott* v. *Armstrong*, 146 U. S. 499, 510 (1892)).

Summary of

(b) The New York Law as to the Consequences of the Pledge was Incorporated in the National Bank Act by Reference.

The Enabling Amendment of June 25, 1930 (12 U. S. C. 90, Appendix, p. 37), provides that a national bank may give security for deposits of "public money of a state or any political subdivision thereof * * * of the same kind as is authorized by the law of the state * * * in the case of other banking institutions in the state."

All of the money here involved was public money of a political subdivision of the state, so that if it can be said that the result of the New York decisions is that a state

bank "is authorized by the law of the state" to give security for deposits, even though *ultra vires*, then that law is incorporated by reference in the National Bank Act by force of the Enabling Amendment, with the result that a national bank in New York is under the same obligation as a state bank to pay secured public deposits when recovering the security.

The question is whether Congress by the words "authorized security" intended to exclude security which is authorized by the decisions of the State of New York just because it results from a transaction disapproved by the legislature of the State of New York.

In spite of the apparent contradiction in terms, both the federal and state courts agree that corporations have power to perform certain acts which are outside of their powers. (*First National Bank of Aiken* v. *Mott Iron Works*, 258 U. S. 24[illegible] (1922); *Pullman's Palace-Car Co.*, v. *Central Transportation Co.*, 171 U. S. 138 (1898); *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, *supra*). In other words, a corporation has *de facto* powers to accept the liabilities and rights thrust upon it by the local law as consequences of the attempted exercise of disapproved powers. It is inescapable that every time a court of the state of incorporation holds a corporation for the consequences of an *ultra vires* act, it holds that the corporation is "authorized" to accept them. Thus, the Circuit Court of Appeals was wrong in limiting the expression "authorized security" to security authorized *de jure*.

An explanation for the choice by Congress of the word "authorized" appears if we assume that the Circuit Court of Appeals were right in the other branch of the case in holding that the National Bank Act should be construed as so clearly decreeing that *ultra vires* pledges should be null and void as to leave no room for the application of the state law on the subject.

Any hesitation that one may have about applying the word "authorized" to *de facto* powers of a corporation arises from our habitual association of authorization with the legislature. Since these powers to accept the conse-

quences of *ultra vires* acts are usually given by judicial decision, they do not generally fit into the class of powers authorized by the legislature. Here, however, by hypothesis, Congress has treated these powers to accept the consequences of *ultra vires* acts as the subject of legislative action so that the word "authorized" is a natural one for Congress to apply to them.

Thus, the expression security "authorized by law" when used by Congress with reference to state banks was at worst equivocal. In the light of the Congressional policy of equality between national and state banks, the construction should be chosen which adopts the law that the state courts apply to security given *ultra vires* by the state banks. It is impossible to conceive of any intelligible motive that Congress might have had for giving the national banks the *de jure* powers of the state banks with regard to public deposits and withholding the *de facto* powers of state banks.

The situation now existing in the State of New York, as a result of the decision below, is a perfect example of the handicap which the national banks, in their competition with the state banks, suffer from failure to give to the transactions of the national banks the same effect which the laws of the state where they are doing business give to the state banks. The fiscal officers of the municipalities of the State of New York know that the City of Yonkers deposited its funds in a national bank and took security and that the City of Mount Vernon deposited its funds in a state bank and took security and that the courts have since decided that the City of Yonkers must return its security without being paid in full while the City of Mount Vernon may hold its security until full payment of the deposits. (*City of Mount Vernon* v. *Mount Vernon Trust Co.*, 270 N. Y. 400 (1936)).

Summary of

POINT II.

The deposits paid out upon checks of the City prior to the date that the Comptroller took over the Bank cannot be recovered by the Receiver even if the security is unenforceable.

Large sums were paid out by the Bank on checks of the petitioners between the institution of the Presidential bank holiday and the appointment of the Conservator. These payments were made in the regular course of business and without infringing the restrictions placed upon banks during the holiday.

Section 91 of Title 12 U. S. C. (R. S. §5242, printed in full in the Appendix, p. 38), is the only authority for recovery of payments as preferential and is the authority under which the Circuit Court of Appeals held that these payments were recoverable. It provides, in substance, that all payments of money "made after the commission of an act of insolvency, or in contemplation thereof, made * * * with a view to the preference of one creditor to another, * * * shall be utterly null and void, * * *."

The Circuit Court of Appeals held (R. 233-234) that the fact that the Bank never opened for regular business after March 4, 1933, and that no attempt was made by the petitioners to show any change in the Bank's condition after March 4, 1933, indicated that the Bank would not be able to pay its depositors in due course and that the trial court could properly draw the inference that the payments were in violation of Section 91.

This clearly exhibits a misapprehension of the scope of Section 91. Mere insolvency at the time payments are made so that they inevitably amount to preferences is insufficient

to warrant their recovery under Section 91. There must be an act of insolvency or contemplation of an act of insolvency and a payment other than one in the regular course of business. (*McDonald* v. *Chemical National Bank*, 174 U. S. 610 (1899)).

Neither the receiver nor the Circuit Court of Appeals made any contention that the restriction of business of all of the banks in the United States pursuant to the Presidential Proclamation amounted to an act of insolvency for such of those as thereafter failed to reopen. Such a contention, if made, would have been satisfactorily answered by the opinions in two cases which have been decided to the contrary; *Kullman & Co.* v. *Woolley*, 83 F. 2d 12 (C. C. A. 5th, 1936); *Richman* v. *First Methodist Episcopal Church*, 76 F. 2d 344 (C. C. A. 3rd, 1935).

Thus, as to the payments made by the Bank before the appointment of the Conservator, which was the first act of insolvency, the petitioners were entitled to treat them as valid, irrespective of the validity of any security held for the deposits.

ARGUMENT.

POINT I.

Even though the Bank was insolvent, the City was entitled to hold the security until payment of its deposits in full. Since that is just what the City did, the deposits cannot be recovered from it.

a. The Common Law of the State of New York by its own Inherent Force Controls the Consequences of the Pledge.

It is the common law of the State of New York that a pledge by a state bank to secure a deposit is *ultra vires* but the assets pledged cannot be recovered by the bank without repaying the deposit. (*State Bank of Commerce* v. *Stone*,

261 N. Y. 175 (*supra*)). In *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245 (*supra*), this Court held that such a pledge by a national bank was likewise *ultra vires* but that the assets pledged could be recovered without repaying the deposit, "in the absence of an identifiable *res* and a constructive trust based on special circumstances of misconduct" (p. 261).

The position of the City is, and was in the courts below, that the National Bank Act (unless it incorporates the state law by reference) makes no provision as to the effect of an *ultra vires* pledge of assets to secure a deposit, that there is no federal common law of national banking and that therefore we must look at the law of the state where the transaction took place to ascertain the effect of an *ultra vires* pledge—first, at its statute law, and, second, in the absence of statute law upon the subject, at its common law. This last step, resort to state common law in federal court litigation rather than to federal common law, is based upon the recent decision of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64 (*supra*), which overruled *Swift* v. *Tyson*, 16 Pet. 1 (1842).

The District Court brushed this argument aside, saying (fol. 583):

> "The instant case does not come within the purview of *Erie Ry. Co.* v. *Harry J. Tompkins*, decided April 25, 1938, unreported. The regulation of the conduct of federal banks is peculiarly in the power of the federal government."

The Circuit Court of Appeals took the same position. It attempted to avoid the fundamental proposition of our argument that the federal statute was silent on the subject, by saying (R. 231) that the decision of the Supreme Court in *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, 260, 261 (*supra*), was based upon an interpretation of the National Bank Act as prohibiting a depositor from retaining,

until his deposit was repaid, securities which had been pledged to him *ultra vires*.

We do not agree with the court below that the United States Supreme Court, in the *Pottorff* case, when it refused to give any effect to the *ultra vires* pledge, was construing the National Bank Act. It was applying "federal common law". Mr. Justice Brandeis was very careful to divide his opinion into three parts, preceded by three ordinal numerals in italics. *First*, came the question of *ultra vires*, and it was there (p. 253) that he discussed the policy of other provisions of the statute with respect to ratable distribution in insolvency as forming a basis for the conclusion that the pledging of assets to secure deposits was *ultra vires*. In the *second* point (p. 260), he held that the circumstances under which the pledge had been made in that case did not create an estoppel, and in the *third* point (p. 261), he held that the *ultra vires* pledge did not result in the consequence that the depositor might hold the pledged assets until his deposit was repaid, because an identifiable *res* and a constructive trust based on special circumstances were essential. In neither the second nor the third points was a word said about the policy of the statute. The New York case (*State Bank of Commerce* v. *Stone*, 261 N. Y. 175, *supra*) was simply cited as *contra* with no attempt to distinguish the *Pottorff* case as one construing a statute. The cases cited as supporting the result reached were not limited to decisions under the National Bank Act but were on the general subject of the effect of an *ultra vires* act. The last two points were decided as a matter of *federal common law* in the absence of a state statute which, even before the decision of *Erie R. R. Co.* v. *Tompkins*, would have been controlling under the familiar rule that, while the law of incorporation determines whether or not a transaction is *ultra vires*, the law of the place of the *ultra vires* transaction determines its effect.

That rule is well stated in the Restatement of the Law of Conflict of Laws. In subdivision c. of the comment under

§ 166, it states that "If an act which is outside the purposes of incorporation (see § 156) or which is prohibited either by the state of incorporation or by the state where the act is to be done (see § 165) is directed to be done by the corporation, the effect of the performance of such an act on behalf of the corporation is governed by the law of the state where the act is done."

Even in the federal courts the local law which now determines the effect of an *ultra vires* pledge is the state statute or the state common law, just as before *Erie R. R. Co.* v. *Tompkins* it used to be the state statute or federal common law. "Federal common law" has, since the decision in *Erie R. R. Co.* v. *Tompkins*, no sway over *ultra vires* pledges except those made in the territories or in the District of Columbia or in some state which has no statutes or decisions declaring the law as to the consequences of an *ultra vires* pledge.

We do not understand the Circuit Court of Appeals to quarrel with the proposition that if federal common law were all that was involved, the mere citation of *Erie R. R. Co.* v. *Tompkins*, would brush it aside and bring into play in its stead the New York state law on the consequences of the *ultra vires* pledge. The Circuit Court of Appeals controverts our statement that the National Bank Act is silent as to the effect of the *ultra vires* pledge. It says that Congress has, by implication, declared that the state law shall give no effect to *ultra vires* pledges where national banks are concerned.

The difference between us is, therefore, that the City construes the National Bank Act as being silent on the subject of the effect of the *ultra vires* pledge while the Circuit Court of Appeals construes it as impliedly declaring that such a pledge shall have no effect.

The construction urged by the City is in harmony with the long established policy of Congress toward placing the national banks upon an equal footing with the state banks in the states where they operate. (*Lewis* v. *Fidelity &*

Deposit Co., 292 U. S. 559, 564, *supra*.) Every time that the courts adopt a construction of the National Bank Act which applies state law to the transactions of the bank, it enables the national banks to compete upon an equal footing with the state banks, and every time that, as here, the courts adopt a special rule for national banks, they run the risk of putting the national banks at a disadvantage in their competition with the state banks.

An intention to supersede the state law as to the effect of the transactions of a national bank is not lightly to be imputed to Congress. The national banking power is not an expressly enumerated one and exists only as an incident of sovereignty. (*M'Culloch* v. *Maryland*, 4 Wheat. 316 (1819)). This Court, in *National Bank* v. *Commonwealth*, 9 Wall. 353, 362 (*supra*), held that it followed therefore that "It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." It may be that the decisions have grown a little more liberal toward the power of Congress, by the enactment of express legislation, to supplant the operation of state laws upon the transactions of national banks, but it still holds true that "a national bank is subject to state law unless that law interferes with the purposes of its creation, or destroys its efficiency, or is in conflict with some paramount federal law." (*Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 566, *supra*; see also *First National Bank* v. *Missouri*, 263 U. S. 640, 656 (1924); *McClellan* v. *Chipman*, 164 U. S. 347, 357 (1896)).

Thus, in order to reach the result that federal law controlled this question as to the effect of an *ultra vires* pledge by a national bank to secure deposits, it was not enough for the courts below to conclude that, if Congress had prescribed the effect of an *ultra vires* pledge, Congress would have made an *ultra vires* pledge null and void. The courts had to find not only the general policy of Congress on such a question but also that Congress had ousted the state law by enacting that policy into an applicable statute and had

thus preempted the field as against state law as to the consequences of an *ultra vires* pledge by a national bank to secure deposits.

We submit that nothing in the National Bank Act indicates an intention on the part of Congress to invade the field of the local law in prescribing the effect to be given to an *ultra vires* pledge. We concede that except where the state law is expressly adopted by Congress, the National Bank Act as construed by the federal courts is the only source upon which we can draw in order to determine whether a given act of a national bank is *intra vires* or *ultra vires*, as those terms are ordinarily used, but unless Congress by an unmistakable exercise of its paramount power in the national banking field invades what would otherwise be the domain of the state, the consequences of such an *ultra vires* act are determined by the law of the state where it occurs. (*Security National Bank* v. *St. Croix Power Co.*, 117 Wis. 211, 94 N. W. 74, *supra*.) No such invasion has been made by Congress.

Incidentally it is to be noted that the acceptance of the state law as to the effect of the *ultra vires* pledge does not result in a state-law lien *arising on insolvency* of the kind properly held invalid so far as national banks are concerned. (*Old Company's Lehigh Inc.* v. *Meeker*, 294 U. S. 227, *supra*; *Jennings* v. *United States Fidelity & Guaranty Co.*, 294 U. S. 216 (1935)). The lien on the security to the extent of the deposits exists from the instant the security is taken. Such a lien, though created by state law, is effective as applied to national banks (*Scott* v. *Armstrong*, 146 U. S. 499, 510, *supra*; *Willing* v. *Binenstock*, 302 U. S. 272, 276 (1937); *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 568, *supra*). The Circuit Court of Appeals distinguished these cases (R. 232) only on the theory that the lien in the case at bar is invalid because it is in "conflict with the policy of the Bank Act". But that is the very question here at issue. We submit that we have shown that the National Bank Act has not invaded the field of state law so as to make any such policy effective.

b. The New York Law as to the Consequences of the Pledge was Incorporated in the National Bank Act by Reference.

The so-called Enabling Amendment of June 25, 1930 (12 U. S. C. §90, Appendix, p. 37) provides:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

It appears therefrom that the security which a national bank may give for "public money of a State or any political subdivision thereof" is security "of the same kind as is authorized by the law of the State" in the case of other banking institutions in the State.

All of the money here involved is "public money" of a "political subdivision of the State". It was so conceded by the receiver in No. 542 and so found by the District Judge (R. 47, 165, 181). In Nos. 543, 544 and 545 the District Judge refused to so find saying it was not necessary to do so (P. R. 141, 126, 136; F. R. 137, 123, 132; S. R. 102, 89, 97). The laws creating the Police and Firemen's pension funds involved in Nos. 543 and 544 are local laws of the City of Yonkers and are set forth in the records (P. R. 109-118; F. R. 108-116). The beneficiaries have no property interest in the funds. Indeed they have not even a contractual interest in them. (*People ex rel. Devery* v. *Coler*, 173 N. Y. 103 (1903), *Dodge* v. *Board of Education*, 302 U. S. 74 (1937).) The Saunders Trade School Fund involved in No. 545 is simply a segregation of funds held by the City as Trustee of a trust for its trade schools. The money in the account constitutes revenues to the City just as do taxes, and is used in meeting the expenditures provided in the budget for Trade Schools (S. R. 65, 67-71).

The fact that the use of funds held by the public is restricted, does not prevent them from being public funds. See *Smith* v. *U. S.*, 170 U. S. 372 (1898), at pages 377, 379, 380.

If it can be said that the result of the New York decisions is that a New York state bank "is authorized by the law of the State" to give security for deposits, which, although it is recoverable whenever the bank or the Superintendent of Banks elects to pay back the deposits, may nevertheless be held by the depositor until such payment, then that law is picked up by the Enabling Amendment and made part of the National Bank Act and a national bank in New York has the same authority with respect to public deposits.

The problem of course is whether the Enabling Amendment, by the use of the words "authorized" security, included security, the giving of which was said by the state court to be *ultra vires* but, nevertheless, enforcible to a limited extent. The Circuit Court of Appeals has, in substance, held that the scope of the expression "authorized security" is so limited as to exclude security which is authorized by judicial decisions of the State of New York but which results from a transaction disapproved by the legislature of the State of New York.

Unless this limitation is to be applied to the significance of the expression "authorized security", Congress adopted and applied to national banks not only the state law as to what pledges are *intra vires* for state banks but also the state law as to the effect of *ultra vires* pledges by state banks.

No subject is more difficult to discuss than that of *ultra vires*. There seems to be a contradiction in terms in saying that a corporation has *power* to perform an act which is outside of its *powers*. Yet both the federal and state courts have held in effect that national and state banks have such power (*First National Bank of Aiken* v. *Mott Iron Works*, 258 U. S. 240, *supra*; *Citizens' Central National Bank* v. *Appleton*, 216 U. S. 196 (1910); *Pullman's Palace-Car Co.*,

v. *Central Transportation Co.*, 111 U. S. 138, *supra*; *Aldrich* v. *Chemical National Bank*, 176 U. S. 618 (1900); *Logan County National Bank* v. *Townsend*, 139 U. S. 67 (1891); *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, *supra*). It was perhaps to avoid that contradiction in terms that the profession preferred to use Latin and say that a corporation had power to perform an "*ultra vires*" act. But however it is to be expressed, there is no doubt that a corporation, as pointed out by the Circuit Court of Appeals (R. 231), has at least two kinds of powers. These powers are, on the one hand, approved powers, and, on the other, powers to accept the liabilities and rights thrust upon the corporation by the local law as consequences of the attempted exercise of disapproved powers. The first class may be referred to as *de jure* powers, and the second as *de facto* powers.

This analysis by the Circuit Court of Appeals in this case reveals that in every case where the law of the incorporating jurisdiction holds a corporation for the consequences of an *ultra vires* act, it does two things: First, it lays down those particular consequences as resulting from the *ultra vires* act, and, second, and necessarily, it holds that the corporation has power to accept those consequences. Accordingly, every time a court of the state of incorporation holds a corporation for the consequences of an *ultra vires* act, it holds that the corporation is "authorized" to accept them.

If Congress was using the word "authorized" in the Enabling Amendment in that sense, then the Enabling Amendment ordained that national banks should not only have all of the *intra vires* powers of competing state banks but also such powers to accept the consequences of their *ultra vires* acts as were ordained by the judicial decisions of their state of incorporation.

The Circuit Court of Appeals was mistaken in saying (R. 229) that "The parties conceded that the law of New York with respect to an *ultra vires* pledge did not bring

the pledges here within the Act of June 25, 1930" (the Enabling Amendment). We did not so concede below nor do we so concede now.

The Circuit Court of Appeals says in its opinion (R. 229) that "a pledge which is '*ultra vires*' cannot be said to be 'authorized'." This overlooks the point so clearly brought out by the court itself that the capacity to accept the consequences of an *ultra vires* act is itself a power. Were we speaking of rights and liabilities thrust upon a foreign corporation by the courts of another jurisdiction as a consequence of an *ultra vires* act, it might be inapt to say that the corporation was "authorized" to accept those consequences. When the courts of the state of incorporation, however, as they do here, thrust these rights and liabilities upon a state bank, the law of that state both creates the rights and liabilities and gives the power to accept them. "Giving" a power is but another word for "authorizing" its exercise.

Another reason why the word "authorized" may seem not to include the *de facto* power to accept the consequences of an *ultra vires* act is that most of us think of "authorized" powers as those which owe their existence or non-existence to the express or implied will of the Legislature, and think of these *de facto* powers as owing nothing to the legislative will for their existence or non-existence. Congress, however, according to the Circuit Court of Appeals, voluntarily and deliberately decreed in the original part of the National Bank Act the non-existence of a certain *de facto* power—the power to accept the consequences of a disapproved pledge to secure deposits. Thus, Congress, the very body which used this word "authorized" in the Enabling Amendment, thinks of these *de facto* powers as being within the class where existence or non-existence depends on the expressed or implied will of the Legislature. Hence, to Congress, "authorized" powers include those *de facto* powers where there is no expressed or implied legislative decree of non-existence. To the mind of Con-

gress, an implied *de facto* power, implied because not denounced by the Legislature, is as truly "authorized" as an implied *de jure* power is "authorized".

Thus the expression, security "authorized by law", when used by Congress with reference to state banks, was, at worst, equivocal. The expression might have referred only to *intra vires* security or it might have included *ultra vires* security which the local law authorized the state bank to recognize. If, by following the Blackstonian canon of construction, to consider the old law and the mischief, we find that the natural intent of Congress would have been to apply the broader interpretation to the word "authorized", we may conclude that Congress did so.

It is settled that the purpose of the adoption of the Enabling Amendment was to enable national banks to compete with state banks for public deposits. (*Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 564, *supra.*) As appeared from the quotation from the opinion in *McNair* v. *Knott*, 302 U. S. 369, at page 4 of the foregoing statement, a majority of the states permitted pledges to secure public deposits. Congress wanted to put national banks on a footing of equality with state banks in these states in so far as their powers to give pledges to secure public deposits were concerned.

It is impossible to conceive of any intelligible motive for distinguishing between *de jure* and *de facto* powers. By the Enabling Amendment, Congress, on the *de jure* side, subjected the national banks to the whim of the state legislatures. The greater good involved in equal competition was thought to justify this. There is no reason why the same consideration would not justify Congress, on the *de facto* side, in subjecting national banks to the decisions of the state courts. If there ever were a Congressional policy against permitting political subdivisions to obtain pledges from national banks which would result in preferences in case of insolvency, that policy was surrendered into the keeping of the several states where the banks operated.

There is no indication, unless it be in the letter of the word "authorized", that Congress was willing to bow to the will of the state legislatures but not to the will of the state courts.

Such a literal interpretation of the word "authorized" would not meet the mischief which the Enabling Amendment was designed to meet. The situation resulting in the State of New York from the decision below is a perfect example of the failure.

A decision rendered by the Court of Appeals of the State of New York after the pledges here involved were made, while it held that such a pledge was not approved by the Banking Law and should be rescinded by the Superintendent of Banks, nevertheless held that it might be retained until the deposit was repaid in full. The City of Mount Vernon, Westchester County, which deposited its funds in a state bank and had them secured by such a pledge, was able to recover its deposits in full, under the New York State doctrine, when the bank failed (*City of Mount Vernon* v. *Mount Vernon Trust Co.*, 270 N. Y. 400, *supra*), but the City of Yonkers, Westchester County, which deposited its funds in a national bank secured by the same pledge, has not been allowed its full deposits by the courts below.

We cannot pretend that unless the decision below is reversed there are going to be a great number of newly-arising cases in New York which will exhibit this discrimination between the treatment of municipalities which have secured pledges from national banks, on the one hand, and those which have secured pledges from state banks, on the other. As respects future banking practice, there are not going to be any pledges given by state banks which might give the state banks the advantage in competing with national banks for public deposits. The Superintendent of Banks is required to visit the New York state banks twice a year and is under strict instructions from the New York Court of Appeals to rescind any pledges to secure deposits

where not contemplated by statute. (*State Bank of Commerce* v. *Stone*, 261 N. Y. 175, 187, *supra*.) As appears from the petition for *certiorari*, however, other existing controversies depend upon the decision of this one. Still more important is the general effect of the decision below upon the attitude of the fiscal officers of municipalities toward national banks as distinguished from state banks. Before the New York Court of Appeals had settled the state common law favoring the municipalities and before the United States Supreme Court settled the federal common law against the municipalities, the national and state banks in Westchester County were competing for deposits of public moneys. The City of Mount Vernon chose a state bank and took security while the City of Yonkers chose a national bank and took security. The fiscal officials of the cities of the State of New York know that the city which used the state bank was held to be preferred when the bank failed and the city which used the national bank was held to be a mere general creditor. The resultant disadvantage of the national banks was precisely what Congress was attempting to obviate by the adoption of the Enabling Amendment. The purpose of Congress can be attained by giving to the word "authorized" its broad but perfectly legitimate sense and applying it to the *de facto* security resulting from a disapproved pledge under the New York law.

POINT II.

The deposits paid out upon checks of the City prior to the date that the Comptroller took over the Bank cannot be recovered by the Receiver even if the security is unenforceable.

A mere finding of insolvency is insufficient in the absence of proof that the payments were made after an act of insolvency or in contemplation thereof with a view to prefer one creditor to another.

On Saturday, March 4, 1933, the City had on deposit with the Bank $277,230.25 in the three accounts involved in the City case (R. 165); the petitioners in the Police case had $29,283.67 in two Police Pension Fund accounts (P. R. 119) and the petitioners in the Firemen's case had $16,590.75 in the Firemen's Pension Fund account (F. R. 117). The subject matter of this point does not apply to "The Saunders Trade School Fund" account involved in No. 545 since none of the funds were withdrawn before the Comptroller took over the bank—the first act of insolvency.

On the next business day, March 6, 1933, the President proclaimed a banking holiday to and including March 9, 1933, during which "all banking transactions shall be suspended" (Proc. #2039; appendix, p. 34) which was continued indefinitely on March 9 (Proc. #2040; appendix, p. 36). Under the authority of the first proclamation the Secretary of the Treasury issued Regulation #10 permitting national banks to carry on their functions for, among other things, "the payment of usual salaries and wages," and "other similar essential purposes" (appendix, p. 38).

Thereafter, and prior to March 20, 1933, when the Comptroller appointed a Conservator (R. 166) the Bank honored checks as follows:

Payroll checks issued by the petitioner in the City case aggregating $89,226.06 (R. 166, 181).

Pension checks issued by petitioners in the Police case aggregating $566.67 (P. R. 121, 135).

Pension checks issued by petitioners in the Firemen's case aggregating $150.00 (F. R. 118).

The receiver brought these actions, among other things, to recover as preferential payments under §91 (12 U. S. C.) 50% of the money so paid out between March 6 and 20, 1933. The District Court permitted such recovery and the Circuit Court affirmed.

The only authority for the recovery of payments as preferential is §91 of Title 12 U. S. C. (R. S. §5242, printed

in full in the Appendix, p. 38), which provides so far as material here that "* * * all payments of money * * *, made after the commission of an act of insolvency, or in contemplation thereof, made * * * with a view to the preference of one creditor to another, * * *, shall be utterly null and void; * * *".

The foregoing statute has often been construed by this and other courts to require proof of payment "after the commission of an act of insolvency, or in contemplation thereof" and "with a view to the preference of one creditor to another." (*McDonald* v. *Chemical National Bank*, 174 U. S. 610, *supra*; *Earle* v. *Carson*, 188 U. S. 42, 1903; *Pearson* v. *Durell*, 77 F. (2d), 465, C. C. A.—6th Cir. 1935; *Rucker* v. *Kokrda*, 68 F. (2d), 73, C. C. A.—10th Cir., 1933).

We believe that the courts below were led into error by failing to note that the only payments which may be set aside are those made after the commission of an *act* of insolvency, or in contemplation of an *act* of insolvency. In ordinary parlance, national banks are deemed to be solvent until there has been the commission of an act of insolvency. Thus, in judicial and colloquial language we find the words "date of insolvency" used to mean "date of commission of an act of insolvency" and the words "contemplation of insolvency" used to mean "contemplation of an act of insolvency". But the fact remains that no transaction can be set aside under Section 91 unless it took place after the commission of an act of insolvency, or in contemplation of an act of insolvency, and unless made with a view to prevent the application of the bank's assets in the manner prescribed by the act, or with a view to the preference of one creditor to another.

In *McDonald* v. *Chemical National Bank*, 174 U. S. 610, *supra*, it appeared that the bank was actually insolvent and that its insolvency must have been known to its officers. Yet this Court held that the statute was not satisfied, saying (p. 618):

> "* * * It is matter of common knowledge that banks and other corporations continue, in many instances, to do their regular and ordinary business for long periods, though in a condition of actual insolvency, as disclosed by subsequent events. It cannot surely be said that all payments made in the due course of business in such cases are to be deemed to be made in contemplation of insolvency, or with a view to prefer one creditor to another. There is often the hope that, if only the credit of the bank can be kept up by continuing its ordinary business, and by avoiding any act of insolvency, affairs may take a favorable turn, and thus suspension of payments and of business be avoided. * * *"

The entire opinion of the Circuit Court of Appeals on the subject is as follows (R. 233-34):

> "* * * The Bank never opened for regular business after March 4, 1933. No attempt was made by the appellants to show any change in the Bank's condition after March 4, 1933. We hold that the facts indicated that the Bank would not be able to pay its depositors in due course and the trial court could properly draw the inference that the payments were in violation of 12 U. S. C. A. §91." Citing cases.

It is obvious from the court's language that it felt that if it could be ascertained from the record that the Bank was unable to pay its debts as they matured on the date of the institution of the Presidential bank holiday, then all payments made by the Bank thereafter could be set aside. As held in the *McDonald* case, *supra*, even such proof would be insufficient to warrant recovery of payments. The proof would have to be supplemented by evidence that those in charge of the Bank had committed an act of insolvency or contemplated such an act and made the payments with a view to prevent the application of the assets in the manner

prescribed by the act, or a view to the preference of one creditor to another. Nothing of the sort appeared in the evidence. There is no evidence of any act of insolvency or that those in charge of the Bank contemplated anything of the sort. The payments made were payments made in the ordinary course of business, as permitted by the Presidential Proclamation.

In other cases the claim has been made that the restriction of the business of all of the banks in the United States pursuant to the Presidential Proclamation amounted to an act of insolvency for such of those as thereafter failed to reopen. While neither of the courts below took this position we cite the following decisions which demonstrate its invalidity: *Kullman & Co.* v. *Woolley*, 83 F. (2d) 129 (*supra*); *Richman* v. *First Methodist Episcopal Church*, 76 F. (2d) 344 (*supra*).

The determination of the Circuit Court in affirming the judgments below is squarely opposed to the decision of this Court in the *McDonald* case and should be reversed insofar as the judgments include the payments made prior to the date of the first act of insolvency, the date on which the Conservator was appointed.

Conclusion.

The judgments should be reversed and the complaints dismissed.

Respectfully submitted,

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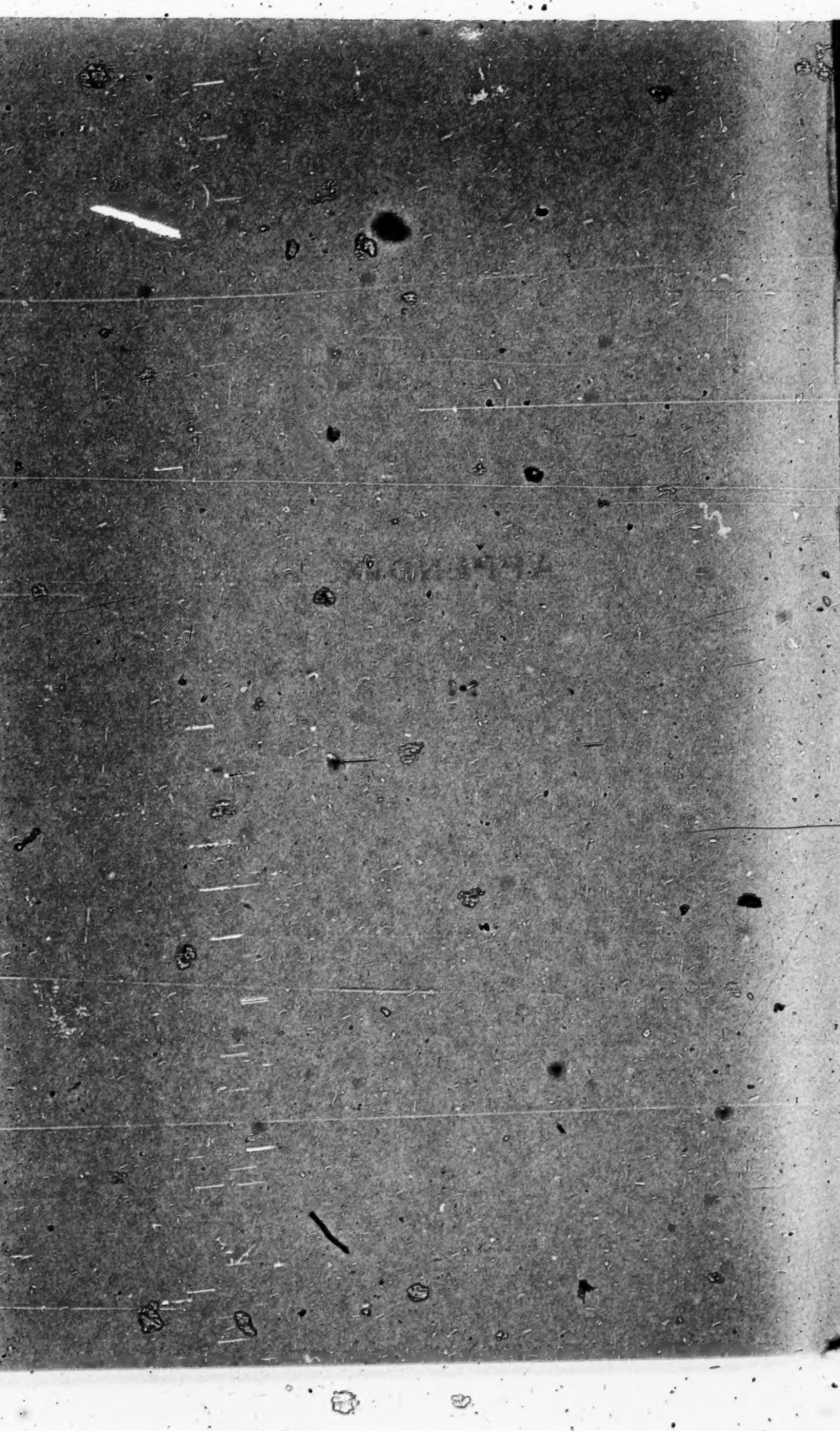
APPENDIX.



Appendix.

Proclamation of President of March 6, 1933, declaring a bank holiday.

PROCLAMATION No. 2039.

"WHEREAS there have been heavy and unwarranted withdrawals of gold and currency from our banking institutions for the purpose of hoarding; and

"WHEREAS continuous and increasingly extensive speculative activity abroad in foreign exchange has resulted in severe drains on the Nation's stocks of gold; and

"WHEREAS these conditions have created a national emergency; and

"WHEREAS it is in the best interests of all bank depositors that a period of respite be provided with a view to preventing further hoarding of coin, bullion or currency or speculation in foreign exchange and permitting the application of appropriate measures to protect the interests of our people; and

"WHEREAS it is provided in Section 5 (b) of the Act of October 6, 1917, (40 Stat. L. 411) as amended, 'That the President may investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange and the export, hoarding, melting, or earmarkings of gold or silver coin or bullion or currency * * *' and

"WHEREAS it is provided in Section 16 of the said Act 'that whoever shall willfully violate any of the provisions of this Act or of any license, rule, or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act, shall, upon conviction, be fined not more than $10,000, or, if a natural per-

son, imprisonment for not more than ten years, or both; . . . ;

"Now, THEREFORE, I, Franklin D. Roosevelt, President of the United States of America, in view of such national emergency and by virtue of the authority vested in me by said Act and in order to prevent the export, hoarding, or earmarking of gold or silver coin or bullion or currency, do hereby proclaim, order, direct and declare that from Monday, the sixth day of March, to Thursday, the ninth day of March, Nineteen Hundred and Thirty Three, both dates inclusive, there shall be maintained and observed by all banking institutions and all branches thereof located in the United States of America, including the territories and insular possessions, a bank holiday, and that during said period all banking transactions shall be suspended. During such holiday, excepting as hereinafter provided, no such banking institution or branch shall pay out, export, earmark, or permit the withdrawal or transfer in any manner or by any device whatsoever, of any gold or silver coin or bullion or currency or take any other action which might facilitate the hoarding thereof; nor shall any such banking institution or branch pay out deposits, make loans or discounts, deal in foreign exchange, transfer credits from the United States to any place abroad, or transact any other banking business whatsoever.

"During such holiday, the Secretary of the Treasury, with the approval of the President and under such regulations as he may prescribe, is authorized and empowered (a) to permit any or all of such banking institutions to perform any or all of the usual banking functions, (b) to direct, require or permit the issuance of clearing house certificates or other evidences of claims against assets of banking institutions, and (c) to authorize and direct the creation in such banking institutions of special trust accounts for the receipt of new deposits which shall be subject to withdrawal on demand without any restriction or limitation and shall be

kept separately in cash or on deposit in Federal Reserve Banks or invested in obligations of the United States.

"As used in this order the term 'banking institutions' shall include all Federal Reserve banks, national banking associations, banks, trust companies, savings banks, building and loan associations, credit unions, or other corporations, partnerships, associations or persons engaged in the business of receiving deposits, making loans, discounting business paper, or transacting any other form of banking business."

Proclamation of President of March 9, 1933, continuing Bank Holiday.

PROCLAMATION No. 2040.

"WHEREAS, on March 6, 1933, I, FRANKLIN D. ROOSEVELT, President of the United States of America, by Proclamation declared the existence of a national emergency and proclaimed a bank holiday extending from Monday the 6th day of March to Thursday the 9th day of March, 1933, both dates inclusive, in order to prevent the export, hoarding or earmarking of gold or silver coin, bullion or currency, or speculation in foreign exchange; and

"WHEREAS, under the Act of March 9, 1933, all Proclamations heretofore or hereafter issued by the President pursuant to the authority conferred by section 5 (b) of the Act of October 6, 1917, as amended, are approved and confirmed; and

"WHEREAS, said national emergency still continues, and it is necessary to take further measures extending beyond March 9, 1933, in order to accomplish such purposes:

"NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, in view of such continuing national emergency and by virtue of the authority

vested in me by Section 5 (b) of the Act of October 6, 1917 (40 Stat. L., 411) as amended by the Act of March 9, 1933, do hereby proclaim, order, direct and declare that all the terms and provisions of said Proclamation of March 6, 1933, and the regulations and orders issued thereunder are hereby continued in full force and effect until further proclamation by the President."

TITLE 12 U. S. C. §90.

§90. Depositaries of Public Moneys and Financial Agents of Government.

"All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: *Provided,* That the Secretary shall, on or before the 1st of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: *Provided,* That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections.

"Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State." (R. S. 5153).

TITLE 12 U. S. C. §91.

"§91. TRANSFERS BY BANK AND OTHER ACTS IN CONTEMPLATION OF INSOLVENCY.

"All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate; or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court. (R. S., §5242.)"

REGULATION NO. 10 OF SECRETARY OF TREASURY.

"Regulation No. 10 (March 7, 1933, as amended on March 10 by addition of matter in italics). 'Any national or State banking institution may exercise its usual banking functions to such extent as its situation shall permit and as shall be absolutely necessary to meet the needs of its

community for food, medicine, other necessities of life, for the relief of distress, *for the payment of usual salaries and wages,* for necessary current expenses and for the purpose of maintaining employment, and for other similar essential purposes. Banking institutions may carry out such transactions as may be necessary to aid banking institutions in other communities *to meet the necessities set forth above.* Provided, however, that (1) every precaution shall be taken to prevent hoarding or the unnecessary withdrawal of currency; (2) no State banking institution shall engage in any transaction under this regulation which is in violation of State or Federal law or of any regulation issued thereunder; (3) no national banking association shall engage in any transaction under this Section which is in violation of any Federal law or of any order or regulation issued by the Comptroller of the Currency; and (4) no gold or gold certificates shall be paid out. Each banking institution and its directors and officers will be held strictly accountable, for the faithful performance, with the spirit and purpose, as well as the letter of this regulation. *Federal reserve banks* may carry on such functions as may be necessary to facilitate transactions authorized by this regulation.' ''